No. 15,396

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

HALTON TRACTOR COMPANY, INC., a Corporation and WES DURSTON, INC., a Corporation,
Appellees.

On Appeal from the Judgments of the United States District Court for the Northern District of California.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

JURISDICTION.

The statement of Appellant as to jurisdiction, seems proper and correct.

STATUTES AND REGULATIONS INVOLVED.

Appellees believe that Appellant has, in its Appendix, set forth all of the statutes and regulations applicable.

STATEMENT OF CASE.

Appellees feel it is necessary to make an additional statement of the case covering certain important points which do not appear from the statement made by Appellant.

Appellant inadvertently by its statement misleads the Court to believe that the Morris Plan Co. mortgage was extinguished before the new mortgage to Halton Tractor Co. was executed. It is true as stated by Appellant, that Halton Tractor Co. paid to Morris Plan Co. the balance due on the mortgage to Morris Plan Co. but Morris Plan Co. did not discharge the mortgage of record as the language of Appellant would lead this Court to believe. The fact is that no discharge or release of the Morris Plan Co. mortgage was ever filed of record or delivered to Watson. (R. 97.)

Further, in stating the understanding between Halton and Watson as to what should be done with the equipment, Appellant makes the express statement that the only deduction was "after deducting the cost of repairs". A reading of the testimony of Mr. Halton shows that all of the costs and expenses of putting it in shape for sale and selling it at retail were intended to be deducted.[1]

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[1]"and I agreed to do this for him, of course, deducting our cost of doing it." (R. 99.)
"* * * Otherwise put it in good running order so that we could list it with our regular list of used equipment and that we could sell it in an orderly manner to obtain a good price for Watson." (R. 100.)
"We would deduct first, of course, the money he owed to us plus the cost of repair, labor and parts and the cost of selling as we pay our salesmen on a commission basis and we have other costs of selling, advertising and so on. * * *" (R. 100-101.)

Mr. Reilly testified that he took a trip to Los Banos with Mr. Halton, and there, in the business establishment of Halton Tractor Co., he affixed signs on the equipment that it was now the "property of United States Government". (R. 181.) Then on the return drive from Los Banos to Merced, Halton protested to Mr. Reilly that "he wasn't even getting a hearing or a trial of any kind." Mr. Reilly told Mr. Halton that he would have to pay it and then he could get a hearing. (R. 109, 135, 136.) Mr. Reilly also told Mr. Halton before there was any agreement by Halton to pay Watson's taxes, that Halton could *not even move the equipment* from his Los Banos place of business to his Merced yard *to repair it.* (R. 138, 139, 185, 186, 187.)

Reilly also told Halton that the government's claim was superior to the chattel mortgage and conditional sales contract because these taxes, withholding taxes and social security taxes had been incurred as the result of the operation of this equipment which fact gave them priority. (R. 104, 129, 130, 131.) Mr. Reilly explained this statement to Mr. Halton, saying:

> "Yes, that's right. And he went on to tell me, too, that since the social security taxes had been incurred upon these machines, those were the ones that the Government was going to exercise on." (R. 129.)

Appellant, we believe, inadvertently, misstates the opinion of the attorney whom Mr. Halton consulted. (App. Brief, p. 6.) The attorney told Mr. Halton the same thing that Mr. Reilly had stated, to-wit: the

Government could sell out Halton Tractor's property rights and interest to pay Watson's taxes. (R. 130.)

Appellant omits the important fact that the equipment was *immobilized* and in effect taken from the possession of Appellees by the acts of Mr. Reilly and his statement that Halton Tractor Co. *could not touch the goods.* (R. 138.) His acts and statements were just as effective as if he had taken them and moved them into a Government warehouse and padlocked the door.

Appellant omits to state that Durston spent a considerable sum of money repairing the equipment after he had it in his possession so that from the total proceeds of the sale he did not recoup one penny of the $3,900.00 he paid for taxes. We will discuss these facts in detail in our argument. In fact, Appellant's statement of fact and argument say nothing about whether or not Durston recouped his tax payment for Watson.

This statement of the case omits to set forth that Halton had called Watson to Merced in the fall of 1947 and asked him what he intended to do about his delinquent balance, and Watson had then agreed to surrender the equipment into the possession of Halton and Durston so that there was in effect a foreclosure of the mortgage and a repossession under the conditional sales contract. (R. 33, 34, 35, 36, 37, 38.) The testimony was that if all of the equipment were sold at auction by the government, it would not have brought enough money to pay Watson's taxes, much less the balance due on the conditional sales contract to Durston, Halton and the mortgage to the Morris Plan Co. (R. 116, 117.)

On the right of Appellees to possession of the equipment, the Court found:

> "That at the time of the acts of said Francis J. Reilly hereinafter referred to said Lloyd H. Watson had defaulted in the making of the payments due under the promissory note secured by said chattel mortgage and otherwise breached the terms and conditions of said chattel mortgage and also the payments due under said conditional sales contract were in default; that therefore the said Lloyd H. Watson had surrendered all said machinery and equipment to plaintiff; and that all said equipment was at said time in the possession of plaintiff and not in the possession of said Lloyd H. Watson." (R. 54, 55, 61.)

SUMMARY OF ARGUMENT CONTRARY TO THE CONTENTIONS OF APPELLANT.

Neither of Appellees has recovered or recouped the moneys paid to the government in discharge of Mr. Lloyd Watson's taxes.

It is crystal clear from the record that Wes Durston, Inc. did not recover one penny of the $3,900.00 he paid on account of Watson's taxes, and the Appellant's argument glosses over the figures in regard to Mr. Durston.

Likewise, plaintiff's Exhibit No. 10 shows that Halton Tractor Co., Inc., a corporation, did not recoup its money paid in discharge of Watson's taxes. Appellant reaches a contrary conclusion by taking the full benefits of Halton's repairing, refurbishing and

the cost of selling the equipment at retail as part of the stock of a going business, in apposition to having it auctioned off in its worthless condition when seized by Mr. Reilly, but refuses to consider or deduct Halton Tractor Company's expenses of selling at retail.

Appellant's contention that there is a variance between Halton Company's claim for refund and the proof at the trial because the Morris Plan mortgage was offered in evidence, mistakes the effect and application of the rule of equitable subrogation.

Appellant's contention in this regard further overlooks the fact that the Morris Plan mortgage was received in evidence under the rule of equitable subrogation to give the new mortgage to Halton Tractor Co. a priority in the amount of the balance due on the Morris Plan mortgage.

Appellant's argument on this point also asks this Court to hold that the form of a claim for refund is a rigid technical procedure, instead of applying the well established rule that claims for refund are only to inform the government of the general nature of the claim so that it may understand, investigate and pass upon the claim. In fact, under the facts of this case, Appellant asks this Court to use the forms, sufficiency and technicalities of the form of the claim for refund as a trap for the unwary.

Additionally, the letters of the Commissioner of Internal Revenue declining the claims, show that the claims were sufficient to enable him to decline the claims on two grounds and further that formally ap-

prising the Commissioner of Internal Revenue of the existence of the Morris Plan mortgage and the rule of equitable subrogation would have been an idle act.[2]

Appellees contend that any argument as to novation is completely without any application where the doctrine of subrogation is applicable and no case supports this contention of Appellant.

Appellees further contend that the Appellant has had full credit for the sale of the items not covered by the original or Morris Plan mortgage and original conditional sales contract; in fact a greater credit than if the government had kept them and auctioned them off in their dilapidated condition when immobilized.

The argument of Appellant that the taxes were not paid under duress is the old familiar argument that third parties like Halton Tractor Co. and Wes Durston, Inc. are in the habit of making gifts to pay third persons' taxes. The evidence shows no "donative intent" but rather "the threatened loss of property" by being taken from their possession, auctioned off to strangers, taken from them by strangers and thereafter lost to Appellees, a real fear of financial disaster if they did not pay a stranger's taxes. (See Finding of Fact VI (R. 56) as to Halton Tractor Co. and Finding of Fact VII (R. 62) as to Wes Durston, Inc.)

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[2]The Commissioner had constructive notice of the Morris Plan mortgage because it was at all times of record in the office of the County Recorder of Merced County. Reilly's negligence in not finding it of record is a poor excuse. (R. 194.)

The argument of a binding contract by Appellees to pay Watson's taxes for a valid consideration, is equivalent to saying that a man with a loaded gun at his head receives a valid consideration for paying over his money to avoid having the trigger pulled.

The argument of Appellant that there can be no duress because Appellees might have sought an injunction or brought quiet title proceedings, is not supported by authority cited by Appellant and furthermore such proceedings, because of the delay, was not a plain, speedy or adequate remedy or protection from loss resulting to Appellees.

ARGUMENT.

I.

ANSWER TO ARGUMENT THAT APPELLEES HAVE ALREADY RECOUPED THE MONEY TO OBTAIN THE RELEASE OF THE PROPERTY.

(a) Wes Durston, Inc., did not recoup any portion of the $3,-900.00 paid in discharge of Watson's taxes.

In this connection, it is well to keep in mind that Wes Durston, Inc. was an equipment dealer and the guarantor of the conditional sale contract, even after selling it to C.I.T. Corporation. (Plaintiff's Exhibit 7.) Furthermore, we believe this Court can take judicial knowledge of the fact that the finance companies, when they have a guarantor on paper who is financially responsible, let the equipment dealer take all the steps to preserve the security. Wes Durston, Inc., in accepting back the equipment from Watson,

had the legal and equitable right to do so, even before it paid off C.I.T. Corporation. It was acting to preserve its security against a threatened loss under a conditional sale contract which was in default.

There is no doubt that Watson was in default, even in 1947, under this contract (R. 155-156) and arranged already in 1947 to surrender the equipment to Wes Durston, Inc. (R. 157) by placing it in the yard of Halton Tractor Co. We think it well also to keep in mind that nowhere in Appellant's brief is it urged that there is any invalidity, priority or subordination involved in connection with the conditional sale contract, under which Wes Durston, Inc. claims.

Wes Durston, Inc. paid $30,100.00 to C.I.T. Corporation, which was the amount of the balance owing by Watson on the conditional sale contract with Wes Durston, Inc. (R. 165.) In addition to this, Wes Durston, Inc. paid $3,900.00 towards Watson's taxes, making his total outlay $34,000.00. It cost Wes Durston, Inc. $500.00 to move the equipment from Los Banos to Los Angeles (R. 166) and $125.00 to move another piece of equipment from Lake County to Los Angeles (R. 166). It cost Wes Durston, Inc. about $1,000.00 for two tires. (R. 167.)

Wes Durston, Inc. is now out of pocket a total of $35,625.00.

Wes Durston, Inc. sold 4 DW 10's for a total of $20,000.00 (R. 167) and 1 D 8 for $6,500.00 and another for $4,000.00 (R. 168). The total therefore received by Wes Durston, Inc. from the sale of the

equipment, was \$30,500.00, leaving a deficit of \$5,-125.00. *In fact, the trial attorney for Appellant conceded there was no equity in the Durston equipment.* (R. 282.)

It is therefore crystal clear that Wes Durston, Inc. did not recoup one penny of the \$3,900.00 paid for Watson's taxes.

(b) Halton Tractor Co., Inc., did not recoup its loss incurred by paying Watson's taxes.

A good standard by which to gauge the argument of Appellant on this point is the first two sentences on page 14 of Appellant's brief:

> "In the cases at bar, it has been stipulated that the taxes paid were in fact assessed against Watson and that the government had a lien, duly filed and recorded, for the amount of those taxes. (R. 177, 210). Under the circumstances, there can be no unjust enrichment of the United States, nor anything unconscionable in its retaining the tax. See *Stone v. White,* 301 U.S. 532, 534; *Ohio Locomotive Crane Co. v. Denman,* 73 F. 2d 408 (C.A. 6th), certiorari denied, 294 U.S. 712."

We ask the Court to observe the half truth of this statement, created by completely omitting the fact that the taxes here were paid by third parties who did not owe them; it is always unconscionable to force strangers to pay the taxes of another person under threat of financial loss if they do not do so.

Halton Tractor Co. to clearly show the facts of the cost and sale of the equipment and its resulting loss introduced in evidence Plaintiff's Exhibit 10. This

was a complete summary of the figures of the entire matter. We have attached a photocopy of this Exhibit in the appendix of this brief for the convenience of the Court. Mr. Bostick, an accountant and the office manager of Halton Tractor Co. testified explaining the exhibit. (R. 213, 223.)

Exhibit No. 10 lists all of the items surrendered by Mr. Watson to Halton Tractor Co., other than those turned over to Wes Durston, Inc. The Court will also notice that the amount for which each item was sold is listed, also the name of the purchaser and the date it was sold; thus placing a complete record of the transactions made by Halton Tractor Co. before this Court.

Mr. Bostick explained the items of "initial cost", which makes up the first column of figures. (R. 216.) This item was the total, as of January 31, 1948, of the principal amount due on the mortgage and the conditional sale contract, including interest to that date, plus the $9,977.97, paid for Watson's taxes. This is using the Morris Plan Co. mortgage as the basis of the charges because under the rule of equitable subrogation, the measure of Halton Tractor Company's rights are found in that instrument.

Appellant unfairly and unjustly disputes the right of Halton Tractor Company to deduct from the amount of the gross sales the following usual and customary expenses of operating a business that is selling merchandise at retail, to-wit:

(a) Sales Department Operating Expenses, $7,931.25;

(c) Additional Interest, $1,935.27;

(d) Ordinary profit on used equipment sold, $1,618.62;

(e) Additional Shop overhead, $276.89.

(Identifying letters copied from Plaintiff's Exhibit 10.)

We will discuss the nature of each of these items and show the correctness of the application of them in this matter.

Item (a) is Sales Department Operating Expenses; this was the cost to Halton Tractor Co. of selling this equipment at retail in the usual course of its business. Of course, if Halton Tractor Co. had sold this equipment in one lot at wholesale prices to another equipment dealer, there would have been no sales expense. However, it is a matter of common knowledge that such a sale would have brought in much less than the $57,807.97 realized by selling the equipment at retail. We feel confident that if Halton Tractor Co., in computing its loss, had put down what each article would have "brought at wholesale," there would have been loud screams from Appellant and a demand that we show what we obtained for the item at retail prices. Appellant does not hesitate to claim the whole benefit of the total proceeds of $57,000.00 plus, obtained by selling the property at retail, but it has no hesitancy at shirking its duty in shouldering the usual sales costs of selling used equipment at retail.

The exact manner in which Halton Tractor Company's cost accountant reached this figure is fully ex-

plained in the record. (R. 272, 273.) There can be no doubt that it was figured in the usual and customary manner to ascertain the cost of sales.[3]

We respectfully submit that inasmuch as Appellant has the benefit of a retail sale, this expense of selling at retail is proper, as a deduction. We notice no reluctance on the part of Appellant in demanding the benefit of the full retail sales price of $57,000.00 plus, and therefore sales cost is proper. Certainly Halton Tractor Co. should not assume it, if Appellant wants the benefit of it.

The item of profit (Item (c) on Exhibit 10) is the rate of profit that Halton Tractor Co. would have made on the sale of other used equipment. Certainly $1618.62 profit on nearly $60,000.00 worth of sales is such a minimum amount of profit to ask that there should be no argument by Appellant. Halton Tractor Co., Inc. could have sold other pieces of equipment to the purchasers shown on Exhibit 10 and would have made this small profit. There is no doubt that Halton Tractor Co. would have made some profit on the equipment it sold to Mr. Watson from the equity it hoped to create, and it was only the acts of the government that prevented the consummation of the transaction. There is no good reason why it should not be allowed its ordinary rate of profit in computing its loss or gain in this transaction.

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[3]In this connection the trial judge offered to Appellant the opportunity of going into the correctness of these charges in more detail if he decided the other aspects of the case in favor of Appellees. However, Appellant chose not to attack these computations and did not go into them any further. (R. 284.)

The next item (d) on Exhibit 10 is the interest that accrued on the chattel mortgage and conditional sale contract from January 31, 1948 to the date that the equipment was sold. This is the amount of $1,935.27. This was interest, figured at the ordinary rate, and is proper as a charge because neither the chattel mortgage nor the conditional sale contract was satisfied until these articles were sold. Only when Halton Tractor Co. sold these articles would interest stop accruing. In respect to this item, like all of the above items, Appellant simply says that they are not to be considered. Why they are not to be considered, we are not told. On the facts, the item of interest and all other items are proper.

The next item on Exhibit 10 is $276.89, listed as the difference between the actual shop overhead and base rate charged. This was explained by Mr. Frank Bostick, Mr. Halton's accountant. (R. 222-223.)

His explanation was that the base rate for shop work was $1.15 per hour and that was the customary rate to charge but at the end of the year 1948, when they totalled the cost of the operation of the shop against hours of work, their rate was actually $1.33 per hour. It is therefore seen that this item could have been figured at $1.33 per hour in the column on Exhibit 10 headed "Repairs in Halton Shop to place equipment in saleable condition." If the Court will read the answer of Mr. Bostick, found on pages 222 and 223 of the Record, it will readily see the justness of this charge.

In fact, we feel it proper to say that looking at each and all of the charges they amount to nothing more than ordinary bookkeeping to ascertain how a business enterprise ended up in a transaction. The net result of these figures is that Halton Tractor Co. lost the money it paid to the government in satisfaction of the taxes of Mr. Watson.

II.

ANSWER TO ARGUMENT BY APPELLANT THAT THE GOVERNMENT'S LIEN WAS SUPERIOR.

In introducing this argument, Appellant, in the second sentence under this point, makes the statement "that in paying off the Morris Plan Co. mortgage, the Halton Co. . . ." This is a misstatement of fact because, as we have heretofore pointed out, the Morris Plan Co. mortgage was not paid off. Rather, Halton Tractor Co. paid Morris Plan Co. the amount of the mortgage and became the owners of the mortgage "in equity".

(a) The District Court was entitled to consider priority of the Halton Tractor Co. under the Morris Plan Co. chattel mortgage. The case of Wes Durston, Inc., is not involved under this point.

Appellant in the District Court at no time disputed the validity or extent of the conditional sales contract between Wes Durston, Inc. and Lloyd Watson. In this Court, Appellant has not in any way challenged the rights of Wes Durston, Inc. under this conditional

sales contract. Wes Durston, Inc. is not therefore involved in this point.

The Morris Plan Co. mortgage was introduced in the District Court, not as a ground for recovery but one of the pieces of evidence to establish the priority of the rights of Halton Tractor Co. The claim for refund filed with the Commissioner of Internal Revenue stated the rights of Halton Tractor Co. in the equipment to be: "belonging to it" and "owned by it". The Morris Plan Co. mortgage was therefore a piece of evidence in the chain of events, proving that the equipment belonged to and was owned by the Halton Tractor Co.

Appellee, Halton Tractor Co., is not advancing anything new at this time; equitable subrogation is a legal rule or doctrine, not Halton's ground of recovery.

Halton Tractor Co. did not in the District Court assert a new ground. Before the Commissioner it did assert the equipment belonged to it, and in view of its legal rights, and Watson's surrender of the equipment to it, that claim is fully established.

Secondly, equitable subrogation is referred and relied upon to give priority to the second mortgage to the extent of the first; in effect *feeds* the second mortgage.

We find it necessary in answering this point to argue the two following propositions:

1. Equitable subrogation is not a new "ground" for claim;

2. The claim filed with the Commissioner of Internal Revenue was sufficient in form.

1. The Appellant has not, to any extent, discussed the nature of the doctrine of equitable subrogation and it therefore becomes our duty to explain its nature and application in this cause.

This rule is best illustrated by the facts and its application in the case of *Potter v. U.S.,* 111 F. Supp. 585. In that case the fixtures of a restaurant were mortgaged by Crawshaw Corporation to Mrs. Crawshaw. About two years later the United States filed notice of its lien against the corporation. Crawshaw Corporation also owed Mr. and Mrs. Wilcox and they requested Mr. Potter to advance sufficient moneys to pay off the balance of the mortgage to Mrs. Crawshaw and $1000 to Mr. and Mrs. Wilcox. Mr. Potter did this, taking a new mortgage for an amount greater by $1000 and at a rate of interest greater than the previous mortgage. Mr. Potter relied upon the theory of equitable subrogation and he asked for priority over the United States to the amount due on the mortgage from Crawshaw Corporation to Mrs. Crawshaw. This, the Court allowed. The Court at page 588 of that opinion says:

> "A person under no obligation who undertakes by agreement with an obligor to pay the latter's debt, with the understanding that he will have the same or equivalent security to that held by the original creditor, and subsequently pays that obligation, will be subrogated to the rights of the original creditor, provided that the entire transaction places no innocent third party in a position more unfavorable than that in which he originally stood. *Industrial Trust Company v. Hanley,* 1933, 53 R.I. 180, 165 A. 223; *Burgoon v. Lavezzo,*

1937, 68 App. D.C. 20, 92 F. 2d 726, 113 A.L.R. 944; *Stovers v. Wheat,* 5 Cir., 1935, 78 F. 2d, 25; *Barnes v. Cady,* 6 Cir., 1916, 232 F. 318; *Rachal v. Smith,* 5 Cir., 1900, 101 F. 159; *Edwards v. Davenport,* C.C., 1883, 20 F. 756.

"Constructive notice of the junior lien is insufficient to defeat his right of subrogation, and his failure to find the junior encumbrance on the record will not be sufficient reason to deny him relief in equity. *Burgoon v. Lavezzo,* supra; *Industrial Trust Company v. Hanley,* supra. Mistake is considered a proper ground for relief in equity. *Industrial Trust Company v. Hanley,* supra; *Conti v. Fisher,* 1926, 48 R.I. 33, 134 A. 849.

* * *

"In applying the doctrine of subrogation, 'no attention should be paid to technicalities which are not of an insuperable character, but the broad equities should always be sought out as far as possible.' *Merchants' & Miners' Transp. Co. v. Robinson-Baxter, etc., Co.,* 1 Cir., 1911, 191 F. 769, 772. If justice will be served by allowing subrogation, conceptual and formalistic arguments will not bar the granting of relief."

The rule of equitable subrogation has been expressly recognized by the Courts of the United States in the following five cases:

Ingram v. Jones, 47 Fed. 2d 135 (C.A. 10th);
Gross v. Tierney, 55 Fed. 2d 578 (C.A. 4th);
Stowers v. Wheat, 78 Fed. 2d 25 (C.A. 5th);
Empire Trust Co. v. U.S. Trust Co., 165 Fed. 2d 829 (C.A. 8th);
Burgoon v. Lavezzo, 92 Fed. 2d 726 (C.A., D.C.).

The latter case of *Burgoon v. Lavezzo* reviews many other cases and referring to the fact that the Federal cases have adopted the rule of equitable subrogation the Court says:

> "These Federal cases clearly reflect the rule requiring liberal application of the doctrine of subrogation and we think they have so far committed the Federal Court to that rule that we ought not refuse to follow the equitable path they have chosen. Hence we feel obliged to recognize a right of subrogation in the instant case."

We also refer to the language adopted from a decision by Justice Taft found in the *Lavezzo* case, as follows:

> "If the purchasers, when they paid off these mortgages, had taken an assignment of them, instead of cancelling them, they could have stood up on them as a plank with which to escape from the wreck. We think that, in the eyes of equity, their relation to junior encumbrances is not affected by the ceremony of cancelling the mortgages. By paying them, under the circumstances of this case, they became substituted to the position of the mortgagees, so far as such a substitution was necessary to protect them from the injustice of having junior encumbrances force them to pay for the property more than once."

The foregoing decisions establish that the Halton Tractor Co. should be given the protection of the Morris Plan Co. mortgage as against the claims of Appellant.

It appears from the foregoing that the Halton Tractor Company's claim is on the second or new mort-

gage and the extent of its priorities are measured by the Morris Plan Co. mortgage. The ground of the Halton Tractor Company's claim is still the second mortgage and it is admitted that a copy of this mortgage was submitted to the Commissioner of Internal Revenue. (Appellant's brief, page 19, R. 145-149.)

It is therefore quite apparent that equitable subrogation is not even a "ground" of recovery much less a new ground of recovery. On the contrary, it appears that it is consistent with the claim of refund, filed with the Commissioner of Internal Revenue and is merely one piece of evidence supporting its claim. It has been held that the *claim* for refund does *not have to contain all the evidence* or argument that is offered in the suit.

> *Snead Collector v. Elmore,* 59 Fed. 2d 312, 314 (C. A. 5th).

2. The decisions of the United States Courts establish that the claim filed with the Commissioner of Internal Revenue was in form that complied with the statutes and Treasury Regulation No. 111, and also that the Commissioner of Internal Revenue waived any rights to object to any insufficiency of the form of claim. Additionally, we will point out to the Court that any further statement of detail by Appellee Halton Tractor Co. would have been the performance of an idle act.[5]

First of all, it is very apparent from page 18 of Appellant's brief, from the manner in which it has

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[5]Just how Appellant's argument on this point applies in the case of Wes Durston, Inc., we are not told in the brief of Appellant and we submit it has not the slightest application in its case.

emphasized "in detail", "each ground" and "exact basis" that it contends for some rigid and stereotyped form of claims and that if you fail to perform any of the technicalities required, you are out in the cold. This is contrary to every decision we have been able to find and the true rule is simply:

> "The statute and the regulations must be read in light of their purpose. They are devised, not as *traps for the unwary* but for the convenience of government officials in passing upon claims for refund and for preparing for trial. Failure to observe them does not necessarily preclude recovery."
>
> *National Commercial, etc., v. Duffy,* 132 Fed. 2d 86, 90 (C.A. 3rd) (adopting language from *Tucker v. Alexander,* 275 U. S. 228.

As recently as 1946 we find the District Court stating:

> "Here the Commissioner appears not to have objected to the sufficiency of the facts presented to him, but considered the claim and acted upon it. In as much as the Commissioner acted upon this claim when it was before him, I am of the opinion that it adequately set out the ground upon which refund was claimed, and presented facts sufficient to apprise the Commissioner as to the basis of taxpayer's claim."
>
> *Furniture Club of America v. U. S.,* 67 Fed. Supp. 764, 766.

> "The Supreme Court of the United States has held that a notice fairly advising the Commissioner of Internal Revenue of the nature of taxpayer's claim which could nevertheless be re-

> jected by him because too general or not complying with formal requirements, may be amended after the statute of limitations has run to correct the lack of specificity."
>
> *United States v. Pierotti,* 154 Fed. 2d 758, 761 (C.A. 9th).

It has also been held that the claim alone is not to be considered in determining the sufficiency of the form of the claim. It has been repeatedly held that other information furnished to the Commissioner by letter, affidavit and the supplying of documents is in the nature of an amendment of the claim.

United States v. Pierotti, supra.

If the Court will read the claims for refund (R. 8-10, R. 17-19) in light of the foregoing decisions and rules, we feel confident that this Court will conclude that the claim of Halton Tractor Co. "presented facts sufficient to apprise the Commissioner as to the basis of taxpayer's claim."

Upon the subject as to whether or not the claim filed by Halton Tractor Co. was sufficient to allow the Commissioner to act upon the claim, we feel that the letter of declination of claim is most pertinent and controlling. These letters were introduced in evidence as Plaintiff's Exhibits 12 and 13. The Commissioner of Internal Revenue denied the refund claim on two grounds, one, the payment was voluntary and two, the sale would be of no effect because it would only reach the taxpayer's equity.

The filing of a certified copy of the Morris Plan mortgage with the Commissioner of Internal Revenue

and the specific statement that Halton Tractor Co. relied upon the doctrine of equitable subrogation would not have in any way affected either one or both of the grounds of declination. The Commissioner would still have asserted that Halton Tractor Co. and Wes Durston Inc., were "Santa Claus", giving money to the Government. The Commissioner of Internal Revenue, no matter how many precise details were given to him, under oath, would still have insisted that Appellees had no claim for refund because the sale would only have affected the equity of Lloyd Watson. The Commissioner would never have recognized "duress" resulting from the fact that Mr. Reilly had immobilized and "seized" the equipment and threatened to sell and deliver its possession over to third parties so that it would be forever lost to Appellees.[6]

The Commissioner of Internal Revenue, in declining the claim for refund admitted that Halton Tractor Co. had certain superior property rights in the machinery and made his declination with that fact before him. (See letters of declination. Plaintiff's Exhibits 12 and 13 and paragraph 10 of Appellant's answer, R. 21, 250.) Neither the extent of that superior property right nor whether its source was the conditional sales contract or the chattel mortgage of one date or another was of any moment or impor-

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[6]Appellees use the words "seizure", "seize", and "seized" in this brief only, as meaning acts done by Mr. Reilly, the Deputy Collector under color of law, depriving Appellees of the right to use their property and not in the sense of a valid, legal act, done in accordance with statute.

tance to him in reaching his decision to deny the claims. The claims for refund clearly set forth that they were based on property rights, superior to the rights of the Government and the case proved in the District Court establish exactly that. This proof was within the scope of Appellees' claims, as understood and acted upon by the Commissioner of Internal Revenue.[7]

The District Court concluded from the letters that the Commissioner was not deprived of the opportunity to consider the claim of Halton Tractor Co. for refund from the standpoint of that company's interest being superior or prior to that of the Government. (R. 50, 51.) The above observations establish the correctness of the trial Court's opinion.

(b) Answer to Argument to Novation.

Assuming that the transaction between Halton Tractor Co. and Mr. Watson was a novation, as claimed by Appellant, we are not apprised of any authority under which the novation eradicates or eliminates the rule of equitable subrogation.

Nowhere in its brief does Appellant cite a case to the effect that a novation makes inapplicable the rule of equitable subrogation.

We have looked in vain in Appellant's brief for such authority and carefully read the four cases cited by it on pages 21-22 of its brief. Neither of them

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[7]This is all that is required by even the case of *Carmack v. Scofield,* 201 Fed. 2d 360 (C.A. 5th), cited by Appellant, at page 362: "* * * but is confined to *the scope of the grounds* for refund, asserted in his claim for refund filed with the Commissioner."

have one word in them about equitable subrogation and none of them involve a situation where it was a question of priorities between a mortgage and an intervening lien.

In cases of equitable subrogation where there has been an extinguishment of the superior mortgage, nevertheless the subsequent mortgage has been held prior to the intervening lien.

The theory of a novation therefore offers no reason in any way depreciating the claim of Halton Tractor Co.

(c) Answer to argument with reference to articles of equipment not covered by Morris Plan mortgage.

It is the position of Appellee Halton Tractor Co. that with reference to the items not covered by the Morris Plan Mortgage the Government has been given a full accounting, full credit and has no cause for complaint.

It appears that a Ford pickup truck, a Chevrolet coupe and 4 diesel fuel tank wagons, listed on Plaintiff's Exhibit No. 10 were not covered by the Morris Plan mortgage.

The two automobiles were sold by Halton Tractor Co. for the amount of $2200.00. If the Court will look at Exhibit No. 10 it will find these two items charged in at $1000.00 and $1200.00. This is part of the items comprising the cost used in the calculations of Exhibit No. 10. However, the Government is given full credit for $1000.00 and $1200.00 under the heading "Sold For". We have therefore $2200.00 in the initial

"cost column" and a $2200.00 credit in the "Sold For" column, i.e., a charge of $2200.00 and credit of $2200.00. This is, in effect, what we would call a "wash" item, one balancing the other. There is no prejudice to the United States Government nor gain to Halton Tractor Co.; both items could be cancelled across the board and the figures would end the same.

Going to the matter of the Diesel fuel tank wagons, we find that Halton Tractor Co. charged a total of $296.10 as its cost for these items. Now, if Halton Tractor Co. had not received these four tank wagons its total cost would still have been $48,496.10 because that is what it was out of pocket. The testimony of Mr. Bostick was that they reallocated the entire cost of this transaction among the different items of equipment. (R. 215 and 217.) This means that if Halton Tractor Co. had not received these four tank wagons this sum of $296.10 would have been divided and added to the initial cost of the other items of equipment.[8] The Appellant is in no way prejudiced by these tank wagons being figured in the entire transaction.

On the contrary, we see that there is no doubt that Appellant was benefited a great deal by the fact that these tank wagons were in two instances repaired and

[8]An example of the same situation would be the following:

A merchant buys a lot of suitcases for $100.00 and there are 10 in the lot. We would say that the cost of each was $10.00. Now, if later, 2 were lost the lot still costs him $100.00 but each suitcase now costs him $12.50.

In our case, if there were only 8 pieces of equipment in Exhibit 10 instead of 14, the cost of $48,496.10 would have to be divided among the remaining 8 pieces.

in three instances were sold at $250.00 a piece, bringing in a total of $824.10 by the process of being sold at retail in the usual course of business of Halton Tractor Co. Appellant has no cause for complaint.

III.

ANSWER TO THE CONTENTION THAT THE TAXES WERE NOT PAID UNDER DURESS.

It is our contention and it was so found by the District Court that these taxes were collected from Appellees under that kind of duress, known as "duress of goods". The acts and statements of Mr. Reilly, even just from his admissions, fully support the finding of the District Court that he threatened financial loss to Appellees unless they paid the taxes of a third person. The facts as found by the District Court (R. 55, 56, 61, 62, 63) establish without doubt that they were sufficient to create a reasonable apprehension in the mind of a reasonable person that if they did not pay Mr. Watson's taxes their rights in the machinery would be lost by the government auction sale.

Furthermore, Mr. Reilly's act of affixing signs to the machinery in the possession of Appellees appears to have been an unauthorized procedure, not found in the Internal Revenue Code of 1939.

The very first sentence of the appellant's argument under this point is erroneous. This first sentence, page 24 of Appellant's brief is:

"These proceedings do not involve a case of a Collector of Internal Revenue having seized the property of third persons, the appellees, to satisfy taxes due and owing by a taxpayer, Watson."

The contrary is the fact and the letter of declination, written by the Commissioner of Internal Revenue, recognizes, as does the answer of Appellant, that these machines were the property of Appellees. Furthermore, this statement seemingly assumes, and footnote 7 (page 27 of Appellant's brief) asserts that Watson was still in possession of the machines. The exact opposite is the fact; Watson was no longer in possession, he had voluntarily surrendered possession of the machines to Halton and Durston because of his default in payments due, and he had no right to again retake possession. It was at Wes Durston's demand that he put the machinery in the yard of Halton Tractor Co. (R. 157) and he, by his agreement with Mr. Halton, lost all right to possession to the machinery, by the very terms of the agreement with Mr. Halton. The Findings of Fact are definitely on the fact that Mr. Watson had surrendered the machinery to Appellees and thereby lost possession.[9] The possessory and all other rights of Mr. Watson were subject to loss upon failure to make the pay-

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[9]Finding of Fact No. IV, in part, is:

"That at the time of the acts of one Francis J. Reilly, hereinafter referred to, said Lloyd H. Watson had defaulted in the payments due under said Conditional Sales Agreement and therefore said Lloyd H. Watson had surrendered all said machinery and equipment to plaintiff; and that all said equipment was at said time in the possession of plaintiff and not in the possession of said Lloyd H. Watson."

ments and this was binding upon Appellant. *Brinker v. Dougherty,* 134 Fed. Supp. 384, 386.

The best proof of what rights Reilly asserted and how completely they were in derogation of the rights of Halton Tractor Co. is well illustrated by Reilly's refusal to allow Halton Tractor Co. to repair and sell the equipment and then pay the Government's taxes. (R. 208.) It is therefore patent that Reilly asserted, on behalf of the United States, legal, equitable and possessory rights superior to any and all legal, equitable and possessory rights of Halton and Durston.

These acts and statements were duress because of their effect upon the minds of Mr. Halton and Mr. Durston.

It has been repeatedly held that duress is a state of mind and the test is the state of mind induced by the threat.

> "The test is not the nature of the threats but rather the state of mind induced thereby in the victim, * * *"
>
> *Wise v. Midtown Motors* (Minn.) 42 N.W. 2d 404, 407.

> "The test seems to be now, not so much the nature of the threat or the words used, but the decision turns on the effect of the threat upon the mind of the servient party."
>
> *Shelton v. Triggs* (Tex.) 226 S.W. 761, 775.

> "The question for determination is as to how the influence used affected his mind * * *"
>
> *S. H. Kress & Co. v. Rust,* 97 SW 2d 997, 1000.

In its findings of fact relating to duress the Court found, among other facts:

> "That at all times prior to the payment of said sums of money by plaintiff to defendant it is believed that if said Francis J. Reilly proceeded to sell said equipment, as he threatened, the same would be taken from the possession of plaintiff by the purchasers at such sale and forever lost to plaintiff."
>
> (R. 56.)

The duress in this case was not the duress of common law but rather the duress which is the opposite of the intent to make a gift of the moneys paid. The contention of Appellant is that the payment by Appellees was voluntary and that they were mere volunteers or intermeddlers. This is just another way of saying that plaintiffs made a donation or gift to pay the taxes of Lloyd Watson.

The Circuit Court of Appeals for this Circuit has always held that "voluntary", as used in the contention of the Appellant, means in the sense of "a donation". This holding is upon the basis that nearly every act is in some sense voluntary but that the sense in which it is used in the contention of the Appellant is in the sense that it is "a donation". The contention of a voluntary payment in the sense of a donation has been a common one by the Appellant and our Circuit Court held against it in the case of *Parsons v. Anglim,* 143 Fed. 2d 534, 537 (C.A. 9th):

> "If the word 'volunteer' in tax parlance has become a word of art, meaning one who cannot re-

> cover moneys paid as a donation to discharge another's tax, it is obvious that is the *volition of intent to donate* which is determinative, not the absence of coercion in the mere act of handling the moneys to the Collector, along with a protest that he does not owe it." (Italics by Court.)

A study of the facts and holding of the *Parsons* case will show it to be sufficient authority to support the holding that the payments herein were not voluntary. But because there is a mass of further authority we will discuss other leading decisions.

A payment under "duress" is the opposite of a "voluntary payment". A payment made under duress can never be called a "donation", because the voluntariness is absent.

It is for this reason that many decisions have used the test of "duress of goods" to prove that the payment was not "voluntary".

Justice Holmes in a leading decision referring to the payment of taxes criticized the slowness of Courts to recognize the implied duress under which payment of taxes is made.

> "* * * courts sometimes, perhaps, have been a little too slow to recognize the implied duress under which payment has been made."
>
> *A. T. & S. F. Ry. v. O'Connor,* 232 U.S. 280, 56 L. Ed. 436, 438.

The development of the law of duress is well sketched in the case of *People v. Orrington* (Ill.) 195 N. E. 642, 643, as follows:

> "At the common law duress meant duress only of person, and nothing short of a reasonable apprehension of imminent danger to life, limb or liberty sufficed as a basis for an action to recover moneys paid. The doctrine became gradually extended, however, to recognize duress of property, as a sort of moral duress, which, equally with duress of person, entitled one to recover money paid under its influence. *Today the ancient doctrine of duress of persons (later of goods) has been relaxed, and extended so as to admit of compulsion of business and circumstances.* (citing cases.) * * * it is not necessary that the party paying the tax be in physical danger, or *that he be actually placed in a position that his property is about to be seized in satisfaction of the tax, or that his back be to the wall,* so to speak." (Italics ours.)

However, in many decisions it has been held that there can be "duress of goods" even without seizure. The payment may be made to prevent loss without a seizure ever taking place and yet there may be "duress" used in the sense of "duress of goods". This was held in the early case of *Robertson v. Frank Bros., Co.,* 132 U.S. 17, 33 L. Ed. 236 when the Court said at page 238:

> "In that case, it is true, the fact that the importer was not able to get possession of his goods without making the payment complained of, was referred to by the court as an important circumstance; *but it was not stated to be an indispensable circumstance.*" (Italics ours.)

* * * * * * *

"When such duress is exerted under circumstances sufficient to influence the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary. * * * When the duress has been exerted by one clothed with official authority, or exercising a public employment *less evidence of compulsion or pressure is required,* * * *"

The Supreme Court in that case referred to the opinion in *Swift v. United States,* 111 U.S. 22, 28 L. Ed. 341, 343, and quoted therefrom, as follows:

"The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business. * * * Money paid, or other value parted with under such pressure, has never been regarded as a voluntary act within the meaning of the maxim volenti non fit injuria."

The rules laid down in these two cases by our Supreme Court have recently been referred to without citation of authority. This, we submit, because it is a rule so well established. We refer to the language in *Stahmann v. Vidal,* 83 L.Ed. 41, 305 U.S. 61, where on page 45, it is said as follows:

"Whether or not the tax was imposed upon the petitioners, they are, according to accepted principles, entitled to recover unless they were volunteers, which they plainly were not because they paid the tax under duress of goods."

The evidence fully establishes that Appellees paid Mr. Watson's taxes to recover possession of equipment

which, for all practical purposes, was locked in a Government warehouse. In addition to this, Appellees were faced with the holding of an auction sale by the Government where each item of property would be sold to a buyer and without a doubt delivered by the Government official holding the sale into the possession of the buyer.[10] In this manner the equipment would be completely taken from the possession of Halton and Durston and if they wished to recover it, they would have to sue each purchaser in a separate suit, and possibly in another state. Proof of the effect of Reilly's seizure and this threatened auction sale upon the mind of Halton, and through Halton upon Durston, amounting to duress is proven by the admissions of Mr. Reilly in his report, dated April 14, 1953, to-wit:

> "Because of conversations with him (Mr. Halton) he (Mr. Halton) realized that were I to seize and sell the property owned by Lloyd Watson under existing liens that quite possibly he (the plaintiff) would never have had no funds made available to him to satisfy his claim * * *" (R. 199.)

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[10]"But Mr. Reilly told me * * * that the Government had a right to seize this equipment belonging to Watson." (R. 104.)
"That if we didn't pay the Government off, that the Government was going to have a forced sale and sell them and we would be left out in the cold." (R. 113.)

"Q. (by Mr. Sharff). Why did you pay this money then, to the United States Government, Mr. Halton?

A. Because I was told that is the way I had to do.

Q. And what were you told the alternative was if you didn't pay it?

A. I was told that the goods would be seized and sold at a forced sale. And I knew this equipment wouldn't bring hardly anything on a forced sale because some of the equipment wouldn't even run." (R. 115.)

Here we have proof of duress of goods from Mr. Reilly's own mouth.

The duress thus exerted upon Halton Tractor Co. was also exerted upon Wes Durston, Inc., because Mr. Halton called Mr. Durston on the telephone and told him about the conversations with Reilly, what Reilly had done, and that if they didn't pay the Government off, that the Government was going to have a forced sale and sell them and they would be left out in the cold. (R. 113.) Durston testified to conversations with Halton, in which the threats of Reilly were repeated to him, including the claim that his conditional sale agreement was of no effect against the taxes due from Mr. Watson. (R. 161, 162, 163.)

The evidence and findings establish that this is a case where the Collector of Internal Revenue attempted to take property of and in the possession of third persons to satisfy a claim for taxes owing from another person. The evidence and the findings show, without a doubt, that Mr. Reilly in the expression of the street "threw his weight around" and caused both Mr. Halton and Mr. Durston to believe that their conditional sales contracts and mortgage were worthless because Watson's employees had worked on these pieces of equipment and the taxes therefore arose from these pieces of equipment. (R. 104, 129, 130, 131.) The record further shows, without a doubt, and it was so found by the District Court, that Appellees both believed that the property would be sold at auction and they would get nothing because the amount the ma-

chinery would bring would only be sufficient to satisfy the Government's claims.

It is clear from the record that the equipment was no longer in the possession of the taxpayer, Mr. Watson, but had been surrendered by him into the possession of Halton Tractor Co. and Wes Durston, Inc.

The Commissioner of Internal Revenue recognized that the only right that Watson might have was an equity and it also appears that that equity could only arise if the articles were sold for more than the amount of the debt to Appellees because Watson had lost his right to possession. Into this scene comes Mr. Reilly who puts labels on each piece of equipment, seizing it as the property of the United States Government and asserting the right to *immobolize it* until the United States Government's taxes were paid. (R. 181.)

The Government's only right and legal procedure was to levy upon Appellees for any equity Watson might have in the equipment in their hands under Section 3690 of the Internal Revenue Code of 1939 (Appendix).[11] This levy would attach to the equity of Watson, if any, in the equipment. If Appellees refused

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[11]Mr. Reilly admitted that this was the proper procedure:

"A. * * * If he cannot pay it and we find out he has any property or salary of wages coming to him, we go and make out the levy which we have in our office, which is already signed by the Director of Internal Revenue. And we serve that on the party that either holds any interest that this taxpayer has demanding payment from that third party of any interest that the taxpayer would have with the third party such as salaries, wages, or equipment or anything else, that they would be holding." (R. 206.)

to pay over the value of the equity or deliver any property belonging to Watson to the United States Government, then Appellees were personally liable to the United States for the value of such rights under subdivision (b) of Section 3710, Internal Revenue Code of 1939. Under this subdivision (b) the United States Government could have brought a suit in the District Court against appellees for a money judgment.

> "Section 3710 was apparently passed to remedy this; it imposed a direct duty upon the recalcitrant holder to surrender them, and authorized an action against him for their value if he refused."
>
> *U. S. v. Metropolitan Life Ins. Co.,* 130 F. 2d 149, 151 (C.A. 2d).

Any other act than levying upon Appellees was the assertion of a power not given by law; an illegal seizure of property rights in the possession of third parties.

It is a far cry from reality to assert that the foregoing facts are only a mistake of law on the part of Appellees and not duress. We believe that even a Justice of this Court, upon finding a sign upon a piece of his property:

"Property of the United States Government
(Notice of seizure)"

might have grave fears and apprehensions of loss. It is this fear that creates "duress of goods".

The same reasons are a complete answer to the argument of Appellant that there was no duress because

the rights of Appellees were subordinate to the rights of the United States, caused Appellees to fear financial loss, if they did not pay the taxes due from Lloyd Watson. This fear of loss, constituted "duress of goods" and the payments of money made by Appellees, were therefore made under duress. Appellees are therefore entitled to recover the same from the United States.

2. The claim for refund filed with the Commissioner of Internal Revenue informed him of the essential and general facts of Appellees' claim for refund and were sufficient for him to investigate, understand, consider and pass upon the claim. The Commissioner of Internal Revenue did not object to the sufficiency of the claim and on the contrary declined it upon two grounds, which recognized that Appellees had rights in the machinery superior to the United States. The grounds given in the letters of declination show that the filing of the Morris Plan Co. mortgage with the Commissioner of Internal Revenue would not have influenced him in his declination and the filing of the same with him would have been an idle act by Appellees. The rule of equitable subrogation is not the statement of a new ground of claim, but is merely a rule of law which feeds the new chattel mortgage to Halton Tractor.

3. In the case of Wes Durston, Inc., there was no showing by Appellant that its conditional sale contract was subject to any infirmity and no showing that it was in any way inferior to the claim of the United States. It was admitted by Appellant at the trial that Watson had no equity whatsoever in the machinery.

4. There is absolutely not one piece of evidence in the record that Wes Durston, Inc., recovered any part of the $3,900.00 paid to Appellant on account of the taxes of Lloyd Watson.

5. The evidence shows that Halton Tractor Co. is entitled to calculate its loss in this transaction in accordance with Plaintiff's Exhibit 10 and it was entitled to judgment as rendered by the District Court.

The Findings of Fact and Conclusions of Law filed in the District Court are fully supported by the evidence in the case and justify the judgments in favor of Appellees. Judgments should therefore be affirmed.

Dated, San Francisco, California,
June 10, 1957.

Respectfully submitted,
HENRY M. JONAS,
ROY A. SHARFF,
Attorneys for Appellees.

(Appendix Follows.)

Appendix.

Appendix

Sec. 3690. Authority to Distrain.

If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with such interest and other additional amounts as are required by law, by distraint and sale, in the manner provided in this subchapter, of the goods, chattels, or effects, including stocks, securities, bank accounts, and evidences of debt, of the person delinquent as aforesaid.

(26 U.S.C. 1952 ed., Sec. 3690).

Sec. 3682. Levy.

In case of neglect or refusal under section 3690, the collector may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property, except such as are exempt by the preceding section, belonging to such person, or on which the lien provided in section 3670 exists, for the payment of the sum due, with interest and penalty for nonpayment, and also of such further sum as shall be sufficient for the fees, costs, and expenses of such levy.

(26 U.S.C. 1952 ed., Sec. 3692).

Sec. 3710. Surrender of Property Subject to Distraint.

(a) Requirement—Any person in possession of property, or rights to property, subject to distraint, upon which a levy has been made, shall, upon demand by the collector or deputy collector making such levy,

surrender such property or rights to such collector or deputy, unless such property or right is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Penalty for Violation—Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered but not exceeding the amount of the taxes (including penalties and interest) for the collection of which such levy has been made, together with costs and interest from the date of such levy.

(c) Person Defined—The term "person" as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

(26 U.S.C. 1952 ed., Sec. 3710).

Plaintiff's Exhibit No 10

Pltf's EX. 10 FOR IDENT.

SCHEDULE OF TRANSACTION COVERING DISPOSAL OF LLOYD WATSON'S EQUIPMENT BY HALTON TRACTOR CO. 1/31/48 - 12/30/48

DATE REC'D	DESCRIPTION	SERIAL NO.	INITIAL COST	REPAIRS IN HALTON SHOP TO PLACE EQUIPMENT IN SALEABLE CONDITION	TOTAL COST OF SALES	SOLD FOR	SOLD TO	DATE SOLD
1/31/48	DW-10 TRACTOR	1N2581)	9000.00	1212.95	10,212.85	10,500.00	MURRIETTA FARMS	3/9/48
"	CW-10 SCRAPER	425)						
"	DW-10 TRACTOR	1N2582)	9000.00	573.88	9,573.88	10,500.00	"	3/9/48
"	CW-10 SCRAPER	430)						
"	1946 FORD PICKUP	E699C-839050	1000.00	- -	1,000.00	1,000.00	MCAULEY MOTORS	2/6/48
"	1942 CHEV. COUPE	E8A46673	1200.00	--	1,200.00	1,200.00	"	2/6/48
"	SOUTHWEST ROOTER	11607	500.00	35.12	535.12	1,000.00	LORING HOAG	4/6/48
"	CW-10 SCRAPER	136	2000.00	- -	2,000.00	2,250.00	BUDD & QUINN	5/26/48
"	DIESEL FUEL TANK WAGON	- -	74.00	65.12	139.12	250.00	GUIDO DELLA SANTA	6/9/48
"	"	- -	74.00	39.62	113.62	250.00	LORINZETTI BROS.	6/23/48
"	"	- -	74.00	- -	74.00	250.00	JOE M. COSTA	7/17/48
"	DW-10 TRACTOR	1N2173	2250.00	1806.91	4,056.91	4,500.00	SANTA FE ROCK & GRAVEL	8/23/48
"	DIESEL FUEL TANK WAGON	- -	74.10	- -	74.10	74.10	HAROLD WINNMILL	12/30/48
"	DW-10 TRACTOR (1)	1N2792	9500.00	1650.31	11,150.31	11,150.31	"	"
"	" (2)	1N2767	4250.00	881.03	5,131.03	5,131.02	"	"
"	" (3)	1N27 91	9500.00	252.53	9,752.53	9,752.53	"	"
"	CW-10 SCRAPER	566	INC. WITH (1)				"	"
"	"	145	INC. WITH (2)				"	"
"	"	568	INC. WITH (3)				"	"
			48,496.10	6517.37	55,013.47	57,807.97		
(A)	SALES DEPT. OPERATING EXPENSES				7,931.25			
(B)	LESS: PORTION OF TAXES PAID BY HALTON REIMBURSED BY OURSTIN,				(3,900.00)			
(C)	POTENTIAL PROFIT ON BASIS OF SALES OF USED EQUIPMENT (EXCLUSIVE OF WATSON EQUIPMENT)				1,618.62			
(D)	INTEREST ACCRUING UNDER CONDITIONAL SALES AGREEMENT AND MORTGAGE,				1,935.27			
(E)	ADD: DIFFERENCE BETWEEN ACTUAL OVERHEAD AND BASE RATE CHARGED (SHOP O/H ONLY)				276.89			
					62,875.50			
			TOTAL PROCEEDS			57,807.97		
			" COST & REVENUE LOSS			62,875.50		
			UNRECOVERED COST & REV. LOSS			5,067.53		